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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SKYWEST PILOTS ALPA ORGANIZING
COMMITTEE, *et al.*,

Plaintiffs,

vs.

SKYWEST AIRLINES, INC.,

Defendant.

CASE No. C-07-2688 CRB

**PLAINTIFFS' REPLY RE:
REMEDIES**

Date: n/a

Time: n/a

Place: Courtroom 8, 19th Floor

1 Plaintiffs submit this brief reply in response to SkyWest's opposition regarding remedies.¹

2 1. SkyWest devotes ten pages of its brief to the jurisdictional issue the Court has
3 said it will rule on in deciding SkyWest's motion to dismiss. SkyWest has no persuasive arguments
4 on the merits of Plaintiffs' SAPA-related claims, on the issue of irreparable harm, or on the Court's
5 broad equitable jurisdiction to provide a meaningful remedy in Railway Labor Act ("RLA") cases.
6 *See, e.g., Texas & N.O.R. Co.*, 281 U.S. 548, 558–59 (1930) (finding unlawful company assistance
7 on very similar facts); *Virginian Ry. v. Sys. Fed'n No. 40*, 300 U.S. 515 (1937); *Konop v. Hawaiian*
8 *Airlines, Inc.*, 302 F.3d 868, 885 (9th Cir. 2002), *cert. denied*, 37 U.S. 1193 (2003) (summary
9 judgment improperly granted against employee on claim of unlawful employer interference based on
10 much weaker facts than those present here); *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935,
11 939 (9th Cir. 1987) (interference with RLA protected rights constitutes irreparable harm); *Burke v.*
12 *Compania Mexicana de Aviacion, S.A.*, 433 F.2d 1031, 1033–34 (9th Cir. 1970) (courts are "free to
13 fashion appropriate civil remedies . . . where necessary to ensure the full effectiveness" of the
14 RLA's purpose); *see also CSX Transp. Inc. v. Marquar*, 980 F.2d 349, 367 (6th Cir. 1992) (courts
15 have "the power to enforce the RLA with any appropriate remedy").

16 2. In briefing the jurisdictional issue, SkyWest continues to ignore decades of case law
17 holding that courts *have* jurisdiction to decide claims of employer violation of RLA Section 2, Third
18 and Fourth – including claims arising during union organizing campaigns and campaigns to replace
19 an existing union with a new one. *See Texas & N.O.R.*, 281 U.S. at 567; *Virginian Ry.*, 300 U.S. at
20 543–44; *Konop*, 302 F.3d at 881–82; *Fennessy v. Southwest Airlines*, 91 F.3d 1359, 1363–64 (9th
21 Cir. 1996); *Burke*, 433 F.2d at 1033–34; *Adams v. Fed. Exp. Corp.*, 547 F.2d 319, 321 (6th Cir.
22 1976); *Roscello v. Southwest Airlines Co.*, 726 F.2d 217, 220 n.2 (5th Cir. 1984); *Stepanischen v.*
23 *Merchants Despatch Transp. Corp.*, 722 F.2d 922, 924–27 (1st Cir. 1983); *AFM Pilots Ass'n v.*
24 *AFM Corp.*, 1982 WL 2030, *1 (D. Mass. March 25, 1982); *Hess v. Resort Air, Inc.*, 686 F.Supp.
25 741, 742 (E.D. Mo. 1988); *Adams v. Fed. Exp. Corp.*, 470 F.Supp. 1356 (W.D. Tenn. 1976), *aff'd*,
26 654 F.2d 452 (6th Cir. 1981); *Union of Prof'l Airmen v. Alaska Aeronautical Indus.*, 1977 WL

27
28 ¹ The Court indicated during the June 8, 2007 hearing that it would consider a reply brief
from Plaintiffs. *See* 6/8/07 Tr. 129:8–9 (accompanying Prestel Decl. Exh. 1).

1 1714, *2 (D. Ala. Apr. 26, 1977); *Lum v. China Airlines Co.*, 413 F.Supp. 613, 614 (D. Hawaii
2 1976); *Griffin v. Piedmont Aviation, Inc.*, 384 F.Supp. 1070, 1071–72 (N.D. Ga. 1974).

3 SkyWest contends that *Texas & N.O.R.* is distinguishable because it was decided before the
4 RLA’s 1934 amendments, which added Section 2, Ninth to the statute. But *Texas & N.O.R.*’s
5 holding and analysis were affirmed in *Virginian Railway*, 300 U.S. at 543–44, decided in 1937.
6 SkyWest attempts to distinguish *Virginian Railway* on the ground that it was decided in a post-
7 certification context, but as Plaintiffs have repeatedly pointed out – and SkyWest never addressed –
8 court intervention is *more* appropriate in a pre-certification case like this one than in a post-
9 certification scenario. *Ass’n of Flight Attendants v. Horizon Air Indus.*, 280 F.3d 901, 905–06 (9th
10 Cir. 2002).

11 3. Although SkyWest states that the NMB can provide relief, it fails to cite even a
12 *single case* where the NMB intervened to fully investigate (let alone adjudicate) pre-election
13 interference. In *Delta Airlines*, 30 NMB 102 (2002), cited by SkyWest, the NMB *deferred* a
14 complete investigation of employer interference until *after* the election. *Id.* at 103; *see* NMB Rep.
15 Manual §17.0, at 24 (2005) (no pre-election investigation absent undefined “extraordinary
16 circumstances”). The NMB emphasized that during the organizing phase of the case, the union
17 “could have sought the *judicial relief* available under Section Third and Fourth, but failed to do so.”
18 *Id.* at 113 (emphasis added). Equally to the point, SkyWest’s own analysis demonstrates that the
19 NMB cannot adjudicate violations of the RLA and is instead limited (even post-election) to
20 approving technical changes to the form of ballot. *See* Def.’s Br. at 5; *see also* *Horizon Air Indus. v.*
21 *NMB*, 232 F.3d 1126, 1133 (9th Cir. 2000) (NMB has no adjudicatory authority); *Am. West Airlines,*
22 *Inc. v. NMB*, 986 F.2d 1252 (9th Cir. 1993) (affirming injunction prohibiting NMB even from
23 notifying employees that in its view employer had violated RLA, because NMB lacks jurisdiction to
24 determine violations of the statute and notice exceeded the scope of its authority).

25 SkyWest also fails to address that its entire jurisdictional theory depends on a factual
26 assertion about which the airline has taken directly contradictory positions. On one hand, SkyWest
27 contends that Plaintiffs must resort to the NMB because the SkyWest Pilots ALPA Organizing
28 Committee (“OC”) has gathered 35% support. *But see* Corrected Reply (Doc. No. 125) at 11–20

1 (demonstrating that this argument is meritless). At the same time, SkyWest contended in open court
2 that SAPA is an RLA representative. If true, this means that Plaintiffs cannot even call for an NMB
3 election until they gather 50% support, not 35% support. *See* 29 C.F.R. §1206.2.

4 4. SkyWest cites *Switchmen's Union of North America v. NMB*, 320 U.S. 297 (1943),
5 but that case is completely inapposite. *Switchmen's* addressed the federal courts' jurisdiction to
6 review an NMB certification once the Board has already acted. The Supreme Court held that once
7 the NMB has certified a bargaining representative, the courts' jurisdiction to review that decision is
8 extremely limited. *Id.* at 300; *see also Trans World Airlines, Inc. v. Ind. Fed'n of Flight Attendants*,
9 489 U.S. 426, 440 (1989) (describing *Switchmen's* as addressing courts' jurisdiction to review NMB
10 certifications); *Am. West Airlines*, 986 F.2d at 1256 (same); *Horizon Air Indus.*, 232 F.3d at
11 1131–32 (same). Nothing in *Switchmen's* purported to limit courts' jurisdiction to protect employee
12 rights during an organizing campaign, *before* the NMB has acted to certify a representative. To the
13 contrary, *Switchmen's* emphasized that its earlier cases approving court intervention in this context
14 remain good law. *See Switchmen's*, 320 U.S. at 300. And, since *Switchmen's*, courts have
15 continued to fulfill their “duty,” *Arcamuzi*, 819 F.2d at 939, to adjudicate claims of improper
16 employer interference in organizing campaigns. *See* cases cited *supra*.

17 5. SkyWest also cites some of the same cases declining to exercise jurisdiction that it
18 has cited in previous briefs. *See* Def.'s Br. (Doc. No. 147) at 3–4, 8–10. As Plaintiffs demonstrated
19 in their Corrected Reply, in *all* of those cases either the NMB's jurisdiction had already been
20 invoked (so that an NMB proceeding was currently pending), *see, e.g., Aircraft Mechanics*
21 *Fraternal Ass'n v. United Airlines, Inc.*, 406 F.Supp. 492, 495 (N.D. Cal. 1976), or the plaintiffs
22 sought to have the court conduct an election or certify (or decertify) a particular union as bargaining
23 representative. *See, e.g., Texidor v. Ceresa*, 590 F.2d 357 (1st Cir. 1978) (court could not conduct
24 an election, decertify representative, or grant relief that would effectively overturn NMB
25 certification decision). In this case, the NMB's jurisdiction has not been invoked; neither party has
26 asked the Court to certify any collective bargaining representative; and there is not even any basis
27 for concluding that a “representational dispute” within the meaning of the RLA exists. *See*
28

1 Corrected Reply at 17–20.²

2 6. SkyWest describes it as “ironic” that Plaintiffs cite decisions of the National Labor
3 Relations Board (“NLRB”). But this approach makes perfect sense given the very different roles
4 played by the NLRB and the NMB. *See, e.g., Horizon Air Indus.*, 232 F.3d at 1131–33. The NLRB
5 is an *adjudicatory* body with authority to determine and remedy employer violations of the National
6 Labor Relations Act (“NLRA”). The NMB, by contrast, has *no adjudicatory authority*. *Id.* at 1131
7 (“Unlike the NLRB, which has broad adjudicatory and remedial powers,” . . . the NMB “has no
8 authority to adjudicate unfair labor practices”) (internal quotation marks omitted). Accordingly,
9 claims of employer interference in violation of the RLA are routinely adjudicated in federal courts,
10 and those courts – like Plaintiffs – cite cases that were adjudicated before the NLRB as persuasive
11 authority. *See, e.g., Konop*, 302 F.3d at 885.

12 7. SkyWest does not and cannot dispute that the Supreme Court has approved complete
13 *disestablishment* as a remedy for employer interference that takes the form of a company union.
14 *See, e.g., Texas & N.O.R.*, 281 U.S. at 557, 560; *Virginian Ry.*, 300 U.S. at 543–44, 549–52 (post-
15 1934 amendments); *NLRB v. Penn. Greyhound Lines*, 303 U.S. 261, 263–66 (1938) (citing *Texas &*
16 *N.O.R.* as authority for the disestablishment remedy); *see also* Plfs.’ Supp. Br. re: Remedies (Doc.
17 No. 140) at 10–11. Nor does SkyWest dispute that the relief Plaintiffs seek in Paragraph 3 – an
18 ability equal with SAPA’s to send group e-mail, to place fliers in pilot mailboxes, and to identify
19 itself as a potential representative during new-hire classes – is far less intrusive than the available
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21 ² SkyWest continues to rely heavily on dicta in the *Aircraft Mechanics* case. As Plaintiffs
22 explained in their Corrected Reply, *Aircraft Mechanics* is distinguishable because in that case –
23 unlike here – a party already had invoked the NMB’s jurisdiction and there was an ongoing NMB
24 election proceeding. *See* 406 F.Supp. at 495. Moreover, *Aircraft Mechanics* held that courts *do*
have jurisdiction over claims of unlawful “company unionism.” *Id.* at 501–02, 509.

To the extent Judge Conti suggested in dicta that a union must call for an election when it
25 reaches a certain level of support, that suggestion finds no support in the relevant NMB regulation,
26 29 C.F.R. §1206.2, is contrary to RLA Section 2, Ninth, which leaves the decision whether to call
27 for an election to the union itself, *see, e.g., Railway Labor Execs. Ass’n v. NMB*, 29 F.3d 655, 658
(D.C. Cir. 1994) (en banc), would put employees to the Hobson’s choice of calling for an election
28 with less than majority support or losing all protection of the RLA, Corrected Reply at 15–16, and
would deny employees and unions the very control over their own organizing campaigns that the
RLA was intended to protect. *See, e.g., 45 U.S.C. §151a; see also Burke*, 433 F.2d at 1033.

1 remedy of disestablishment (and is similar to equal access remedies provided by the NLRB in
 2 various cases, *see* Plfs.’ Br. at ii–iii). Instead, SkyWest is left to contend that granting the OC the
 3 equal access to which it is entitled would be “disruptive” because company e-mail is for “company-
 4 related information” and because new-hire training classes are expensive for the airline.

5 SkyWest’s first point is factually incorrect given the undisputed evidence that SAPA uses
 6 company e-mail for campaign purposes and to criticize ALPA. *See, e.g.*, 6/7/07 Tr. (Doc. No. 134)
 7 237:24–238:4 (Captain Kanuch’s testimony that SAPA uses the group e-mail system for its election
 8 campaigns); Martirano Decl. Exh. 1 (SAPA communication sent via email, criticizing SAPA).
 9 Even more important, SkyWest still fails to address the Ninth Circuit’s holding in *Arcamuzi* that
 10 violation of employees RLA Section 2 right to organize free of employer interference is *per se*
 11 irreparable harm that courts have a “duty” to remedy. *Arcamuzi*, 819 F.2d at 938–39.

12 Neither the inconvenience of one more email nor SkyWest’s financial investment in new-
 13 hire classes can possibly constitute irreparable harm under controlling Ninth Circuit case law. *See,*
 14 *e.g.*, *Los Angeles Memorial Coliseum Comm’n v. NFL*, 634 F.2d 1197, 1202 (9th Cir. 1980)
 15 (injuries compensable by monetary damages are not irreparable). And the balance of equities
 16 weighs heavily against SkyWest given that it permits SAPA (an illegal company-funded “union”) to
 17 use both of these channels of communication, including for the purpose of criticizing ALPA. *See*
 18 6/7/07 Tr. 237:24–238:4; Martirano Decl. Exh. 1; 6/7/07 Tr. 200:11–201:5 (negative statements
 19 about ALPA during new-hire classes); 6/8/07 Tr. 120:11–121:18 (same).

20 8. SkyWest’s final argument is that proof of actual and active control is required to
 21 prove a “domination” claim under the NLRA. However, the RLA also prohibits mere “interference”
 22 – short of domination. *Compare* 45 U.S.C. §152, Third and Fourth (prohibiting employer
 23 interference and any use of carrier “funds” to “maintain[] or assist[] or contribut[e]” to a labor
 24 organization, without requiring domination) *with* 29 U.S.C. §158(a)(2) (creating two prongs –
 25 domination and interference – of unfair labor practice).

26 The Supreme Court set the standard for unlawful interference and assistance under the RLA
 27 in *Texas & N.O.R.*, when it held – based on facts very similar to those here – that a carrier violated
 28 the Act when it permitted employees to devote their time to company-union business without

deduction from pay, paid the company union's expenses, intimidated employees who supported an independent union, and pressured employees to join the company union. *See* 281 U.S. at 559–60. Here, SkyWest pays SAPA representatives more than ordinary pilots earn, 6/7/07 Tr. 125:9–12, 226:16–227:2, 248:2–249:6, pays all of SAPA's expenses and provides it with additional in-kind assistance, *see e.g., id.* at 235:3–8, 243:9–11, threatens ALPA supporters with termination and denies them promotions, *see, e.g., id.* at 117:4–123:18, 150:15–154:12, Plfs.' Exh. 10, and automatically forces all employees to be members of SAPA. *Id.* at 224:20–225:1; 6/8/07 Tr. 81:17–21. Indeed, the evidence shows that SkyWest changed SAPA's organizational structure in direct response to an ALPA organizing campaign, *id.* at 6/7/07 Tr. 230:6–15; 6/8/07 Tr. 122:13–123:11, and that SAPA's secretary is a member of management ineligible for membership in SAPA who reports on his work to upper management and who has assumed increasing control of SAPA in direct contravention of its bylaws. *Id.* at 6/7/07 Tr. 226:16–228:23, 234:14–235:13; 6/8/07 Tr. 6:16–19, 9:4–7, 13:19–25, 22:23–23:8, 54:19–23, 70:23–71:2, 71:13–73:8, 73:14–74:4, 118:20–23; Defs.' Exh. 6.

More recently, the Ninth Circuit reiterated in *Konop* that the RLA's rule against employer interference and assistance “[g]enerally . . . prohibits employers from providing assistance to a union or labor faction” and from “assist[ing] one union faction over another.” *Konop*, 302 F.3d at 885. In that case, the Ninth Circuit held that the employer's mere sharing of information from a pilot's website with the incumbent union created a triable issue of fact regarding unlawful assistance. *Id.*

The threshold for establishing unlawful employer interference under the RLA is not high and is clearly satisfied in this case. It is equally clear that this federal district court has broad equitable authority – indeed a “duty,” *Arcamuzi*, 819 F.2d at 939 – to provide a meaningful remedy for the ongoing violation of Plaintiffs' RLA-protected right to organize free from employer interference. *Burke*, 433 F.2d at 1033–34 (courts are “free to fashion appropriate civil remedies . . . where necessary to ensure the full effectiveness” of the RLA's purpose); *CSX Transp. Inc.*, 980 F.2d at 367 (courts have “the power to enforce the RLA with any appropriate remedy”). To deny Plaintiffs the relief requested in Paragraphs 3 and 4 would deny them *any* effective remedy for SkyWest's

1 ongoing, unlawful, and inherently coercive support for a wholly carrier-funded company “union” –
2 the very type of employer interference that the Supreme Court has described as a “convenient
3 weapon to prevent the exercise of . . . employees’ rights to self-organization.” *See NLRB v. Falk*
4 *Corp.*, 308 U.S. 453, 461 (1940) (internal quotation marks omitted); *see also Penn. Greyhound*, 303
5 U.S. at 271. This is precisely the result the Ninth Circuit warned against in *Burke* when it
6 emphasized that courts may not permit violations of employees’ RLA-protected rights to go
7 unremedied. *Burke*, 433 F.2d at 1032–33.

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9 Dated: June 15, 2007

Respectfully submitted

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